Che Nik bte Bakar v Pentadbir Tanah, Kuala Krai

HIGH COURT (KOTA BHARU) — ORIGINATING MOTION NO 25–13 OF 1993
NIK HASHIM JC
12 SEPTEMBER 1996

Land Law *— Land Administrator's right of way — Creation — Land Administrator's discretion in granting such right — Existence of reserved road as alternative route — Whether reserved road constitutes practical and reasonable alternative route — Whether doctrine of salus populi supreme lex applicable — Whether land administrator had exercised his discretion properly in granting such right — National Land Code 1965 s 390(3)*

Since 1973, Great Eastern Mills Bhd ('GEM') had used the road known as 'Jalan Great Eastern' ('the road') which ran across the appellant's land. However, when the government granted the land to the appellant absolutely free of any right of way, she blocked the road, thus forcing GEM to enter into an agreement that GEM was to pay a monthly toll of RM500 for the use of the road. GEM therefore made an application to the land administrator for an order of a public right of way. The land administrator granted the order. The appellant appealed against the order. The appellant defended her objection to the public right of way based on the principle of inviolateness of land and argued that there was an alternative route available, namely a road reserve which was mapped on paper.

Held, dismissing the appeal:

(1) The reserved road was not a road in the sense that it was practical and readily available for use by the public. Therefore, it was not reasonable to treat the road reserve as an alternative route (see pp 521I and 522A); *Liew Peck Lian & Ors v The Conservator of Forests* [1961] MLJ 117 and *Sri Rusa Inn Sdn Bhd & Ors v Collector of Land Revenue, Port Dickson & Ors* [1987] 1 MLJ 147 distinguished.

(2) Section 390(3) of the National Land Code 1965 allows for the creation of public right of way on private land. The principle of inviolateness of land must be considered in the light of the doctrine of *salus populi supreme lex* — the interests of the public are paramount, and that private interests may in some circumstances be subordinated to the higher interest of the public, when the State thinks it is proper to do so (see p 522B–C); *S Kulasingam & Anor v Commissioner of Land, Federal Territory & Ors* [1982] 1 MLJ 204 followed.

(3) In the absence of an alternative route, there was thus an urgent public necessity for the land administrator to grant a public right of way across the appellant's land, even though it was against the principle of inviolateness of land. The private interest of the appellant that she might lose good income from the use of her road must give way to the higher interest of the public. The land

A administrator was therefore correct in making the public right of way on the appellant's land, and had exercised his discretion properly (see p 522E–G).]

[Bahasa Malaysia summary

B Semenjak tahun 1973 lagi, Great Eastern Mills Bhd ('GEM') telah menggunakan jalan yang dikenali sebagai 'Jalan Great Eastern' ('jalan tersebut') yang melalui tanah perayu. Akan tetapi apabila kerajaan memberikan tanah tersebut kepada perayu bebas dari sebarang hak lalu-lalang, perayu telah menyekat jalan tersebut, menyebabkan GEM C terpaksa mengikat satu perjanjian yang mana GEM harus membayar tol bulanan sebanyak RM500 untuk menggunakan jalan tersebut. Dengan itu GEM membuat permohonan kepada pentadbir tanah untuk perintah hak lalu-lalang awam. Pentadbir tanah membenarkan permohonan tersebut. Perayu membuat rayuan terhadap perintah itu. Perayu membela bantahannya terhadap hak lalu-lalang awam D berdasarkan prinsip ketakbolehcabulan tanah dan menghujahkan bahawa terdapat satu jalan alternatif, iaitu jalan yang ditunjukkan di peta sebagai jalan simpanan.

Diputuskan, menolak rayuan:

E (1) Jalan simpanan bukanlah jalan dalam erti kata satu jalan yang praktikal dan telah sedia ada untuk kegunaan umum. Oleh yang demikian, ianya tidak munasabah untuk menganggap jalan simpanan sebagai satu jalan alternatif (lihat ms 521I dan 522A); *Liew Peck Lian & Ors v The Conservator of Forests* [1961] MLJ F 117 dan *Si Rusa Inn Sdn Bhd & Ors v Collector of Land Revenue, Port Dickson & Ors* [1987] 1 MLJ 147 dibeza.

(2) Seksyen 390(3) Kanun Tanah Negara membenarkan pewujudan hak lalu-lalang awam di atas tanah persendirian. Prinsip ketakbolehcabulan tanah mestilah dipertimbangkan memandangkan doktrin *salus populi supreme lex* — kepentingan G awam adalah paling utama, dan kepentingan persendirian mungkin dalam sesetengah keadaan dibelakangi demi kepentingan awam yang lebih utama, apabila kerajaan negeri fikirkan wajar untuk bertindak demikian (lihat ms 522B–C); *S Kulasingam & Anor v Commissioner of Land, Federal Territory & Ors* [1982] H 1 MLJ 204 diikut.

(3) Dalam ketiadaan suatu jalan alternatif, terdapat suatu keperluan umum untuk pentadbir tanah memberikan hak lalu-lalang awam yang melalui tanah perayu, walaupun ia adalah bertentangan dengan prinsip ketakbolehcabulan tanah. Kepentingan I persendirian perayu bahawa dia mungkin akan hilang pendapatan yang lumayan daripada penggunaan jalannya mestilah menyerah kepada kepentingan umum yang lebih utama. Oleh yang demikian, pentadbir tanah adalah betul dalam mewujudkan hak lalu-lalang awam atas tanah perayu, dan telah melaksanakan budi bicara beliau dengan sewajarnya (lihat ms 522E–G).]

Notes

For cases on the Land Administrator's right of way, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1897–1898.

Cases referred to

Liew Peck Lian & Ors v The Conservator of Forests, Johore [1961] MLJ 117 (distd)

S Kulasingam & Anor v Commissioner of Land, Federal Territory & Ors [1982] 1 MLJ 204 (folld)

Si Rusa Inn Sdn Bhd & Ors v The Collector of Land Revenue, Port Dickson & Ors [1987] 1 MLJ 147 (distd)

Legislation referred to

National Land Code 1965 s 390(2), (3)
Federal Constitution art 13(2)

Mohd Apandi bin Ali (*Messrs Apandi Ali & Co*) for the appellant.
Azman bin Abdullah (Senior Federal Counsel) for the respondent.

Cur Adv Vult

Nik Hashim JC: This is an appeal by way of motion by the appellant against the order of the Land Administration Kuala Krai, who made an order under s 390(3) of the National Land Code 1965 ('the Code') for a public right of way across the appellant's land Lot No PT 4520 HS(M) 26/92 Mukim Manjor ('the land') on 14 February 1993.

It is significant to note that there used to be a road from Kg Lalok to Hutan Simpan Lebir across the land and this road known as 'Jalan Great Eastern' was utilized by the public, including the Great Eastern Mills Bhd ('GEM') since 1973. Indeed, it was GEM who constructed the road. GEM used the road to transport logs from its forest concession at Hutan Simpan Lebir. But in 1992, the government granted the land to the appellant, who was a settler, absolutely free of any right of way. The appellant blocked the road forcing GEM to enter into an agreement with her. Under the agreement, GEM was to pay the appellant a monthly toll of RM500 for the use of the road.

Meanwhile, GEM made an application to the land administrator for a public right of way. Thereupon, the land administrator who after having heard the evidence of the interested parties, made an order for a public right of way of 0.686km across nine lots of land including 0.0653 hectare of the lot belonging to the appellant. Due compensations were paid to the affected land owners.

Encik Fauzi bin Mat (K8), the land administrator who made the order, affirmed some of the following in his affidavit dated 31 March 1994:

(a) Seperti yang dikehendaki oleh s 390(2) Kanun Tanah Negara 1965, sebelum memerintahkan supaya hak lalu-lalang tersebut diwujudkan, saya telah menjalankan siasatan pada 13 Januari 1993 di mana pihak-pihak berkepentingan seperti tuan-tuan tanah, Penggawa Daerah, Penghulu Mukim, Penyelia Kawasan Rancangan Tanah Sg Rek, tuan

punya syarikat Hj Ismail Taib dan perayu telah diberi peluang untuk memberikan keterangan dan pendirian masing-masing.

Berikutan dengan itu, siasatan juga telah dibuat ke atas kawasan tersebut. Encik Mohd Nawi bin Awang (K7), Pegawai Penempatan Pejabat Tanah dan Jajahan Kuala Krai, telah menyiasat dan menyediakan laporan seperti dieksibitkan di FM5 dan FM6.

Walaupun permohonan untuk hak lalu-lalang awam telah dibuat oleh Great Eastern, saya berpuashati adalah mustahak diwujudkan hak lalu-lalang awam dan bukan sekadar hak lalu lalang persendirian, kerana terdapat bukti-bukti yang menunjukkan bahawa —

(i) Jalan ini sudahpun wujud dan digunakan sejak tahun 1970an lagi. Pada waktu-waktu itu tanah tersebut belum lagi diberi milik.

(ii) Jalan tersebut telah dan sedang digunakan oleh orang ramai dan penggunaan tersebut tidak mendapat apa-apa bantahan daripada mana-mana pihak terutamanya tuan-tuan tanah. Jalan ini juga merupakan satu-satunya jalan yang telah dan masih digunakan oleh penduduk daripada beberapa buah kampung seperti Kampung Depak, Kampung Belia, Kampung Pidak, Kampung Susudara dan Kampung Miak. Jalan ini digunakan oleh penduduk kampung tersebut untuk keluar ke jalan besar Kuala Krai/Gua Musang.

(iii) Jalan ini juga digunakan oleh kenderaan-kenderaan awam dan juga jabatan-jabatan kerajaan yang berurusan dengan penduduk tempatan.

(iv) Jalan yang dimaksudkan ini juga merupakan suatu jalan utama yang menyambung daripada Hutan Simpan Lebir ke Jalan Gua Musang-Kuala Krai.

(b) Di samping itu, daripada siasatan yang dijalankan oleh Pejabat Tanah dan Jajahan Kuala Krai, tiada terdapat jalan lain yang boleh digunakan oleh orang awam dengan kenderaan-kenderaan untuk pergi daripada tempat bertanda C ke tempat bertanda J seperti yang ditunjukkan dalam eks FM2. Jarak di antara kedua-dua tempat tersebut ialah lebih kurang 6.336km.

(c) Adalah jelas bahawa bukan keperluan dan permohonan Great Eastern Mills Bhd sahaja yang mendesak suatu hak lalu-lalang diwujudkan, tetapi ramai lagi orang awam lain yang sangat-sangat memerlukan supaya hak lalu-lalang awam diwujudkan untuk menjalankan urusan-urusan serta kehidupan mereka sehari-hari.

Walaupun simpanan jalan tersebut telah ada tetapi belum dibuat jalan lagi. Kawasan simpanan jalan tersebut dipenuhi oleh hutan belukar. Keadaan rupa buminya adalah berbukit dan bercerun seperti laporan Pegawai Penempatan eks FM6 yang membuktikan fakta ini.

In his affidavit in reply dated 2 October 1995, En Fauzi again affirmed among other things:

Mengenai perenggan 5 afidavit jawapan plaintif, saya mengatakan bahawa walaupun sebahagian daripada mereka (orang awam) adalah peneroka haram dan bukan penduduk tetap kawasan tersebut, tetapi saya menegaskan bahawa mereka perlu bergerak untuk masuk atau keluar ke tanah mereka. Tanpa jalan ini, pergerakan mereka akan terhalang. Selain daripada itu saya juga menyatakan bahawa beberapa lot tanah telah diberi milik seperti HS(M) 43/92, HS(M) 22/92, HS(M) 31/92, HS(M) 42/92, HS(M) 36/92 dan GM 1285 dan tuan-tuan tanah berkenaan juga memerlukan jalan untuk keluar masuk. Kedudukan tanah tersebut adalah sebagaimana dalam pelan. Pelan tersebut dikemukakan dan ditandakan sebagai eks 'FM 1'.

Selain daripada itu, saya juga menyatakan bahawa terdapat satu penempatan orang asli dan sebuah lombong barite di kawasan ini. Pergerakan orang asli dan pekerja-pekerja lombong barite adalah melalui jalan ini. Kedudukan penempatan dan lombong berkenaan adalah seperti dalam lampiran eks 'FM 2'.

Walau bagaimanapun, saya tidak mempunyai pengetahuan sama ada jalan ini pernah mendapat peruntukan kerajaan atau tidak. Oleh itu, saya menyatakan bahawa pengujudannya adalah perlu dan dapat memberi manfaat kepada orang awam.

Saya menafikan tohmahan yang terdapat di perenggan 6 afidavit jawapan plaintif dan saya menyatakan bahawa perintah pengujudan hak lalu-lalang itu dibuat berasaskan fakta-fakta yang dikemukakan sewaktu siasatan dan berdasarkan keperluan pengujudannya. Saya tidak mempunyai pengetahuan tentang kewujudan Jalan Kampung Lepar ke Kuala Aring.

Saya menafikan kandungan di perenggan 11 afidavit jawapan plaintif dan saya menyatakan bahawa 'jalan ini' telah wujud sejak tahun 1970an lagi dan ianya digunakan oleh orang ramai tanpa apa-apa bantahan daripada plaintif. Bantahan hanya timbul selepas tanah tersebut diberi milik kepada plaintif pada 10 Mac 1992. Saya juga menyatakan bahawa jalan yang dipertikaikan ini sepatutnya dikeluarkan dan tidak diberi milik kepada plaintif tetapi oleh kerana kesilapan teknik, Pentadbir Tanah Kuala Krai telah tidak mengeluarkan jalan ini daripada pemberian milik hakmilik yang kemudiannya didaftar kepada plaintif. Saya juga menafikan bahawa pengujudan hak lalu-lalang ini adalah dibuat secara mala fide dan menegaskan bahawa pengujudannya adalah dibuat secara suci hati dan bona fide. Seterusnya saya menyatakan hak lalu-lalang itu dibuat berdasarkan keperluan orang awam di kawasan itu.

Encik Mohd Apandi bin Ali, who appeared for the appellant, argued that the land administrator did not exercise his discretion properly when he made the order of public right of way in that he:

(i) failed to consider the existence of the road reserve;

(ii) failed to consider the evidence of Awang bin Da who said: 'ada jalan lencongan ke Lot 864';

(iii) failed to consider objections from the land owners including the KESEDAR; and

(iv) entertained the application of GEM who went out to frustrate the agreement between GEM and the appellant.

Encik Azman bin Abdullah, Senior Federal Counsel on behalf of the respondent, submitted that the public right of way was made because there was no alternative route available. The road reserve is not practical and reasonable as it is still a hilly jungle. In other words, the road reserve is still on paper. The appellant was adequately compensated for the right of way. With the right of way on her land, she stood to lose RM500 per month for the use of the road by GEM. Hence her objection.

Section 390(3) of the Code provides:

> The Land Administrator, if on holding an enquiry or making an investigation he is satisfied that it is expedient for a private or public right of way to be created, shall make an order creating the right of way.

In *Liew Peck Lian & Ors v The Conservator of Forests, Johore* [1961] MLJ 117, a case of right of way granted under Johore's former and repealed Land Enactment, Adams J at p 118 said:

> Before a right of way can be granted under these provisions, the Collector must satisfy himself that access is not otherwise reasonably available and 'reasonably' here certainly does not mean 'conveniently'. I think it is necessary to bear this in mind. The Collector must look at all the circumstances. He must consider whether the alternative routes if any are at all practical. This does not mean that they must necessarily be the cheapest, or most convenient.

Liew's case was considered in *Si Rusa Inn Sdn Bhd & Ors v The Collector of Land Revenue, Port Dickson & Ors* [1987] 1 MLJ 147. In the course of his judgment, Peh Swee Chin J (as he then was) at p 152 opined:

> ... it is my view that when a Collector is satisfied that it is expedient, it is tantamount to this, that he should then act or exercise his discretion properly and reasonably, in all cases, save in exceptional circumstances where such departure from such propriety or reasonableness can be made.

And he continued to say at same page:

> Any authority that is conferred on a public official to grant a right of way against a landowner for the benefit of another has to be exercised ... for a proper purpose and reasonably unless exceptional circumstances exist.

In the two cases cited above, it is noted that there were in fact alternative routes. Therefore, it would be pertinent at this stage to examine the facts in this case in order to see whether the decision of the land administrator is correct in law and in fact.

It is not in dispute that the road across the appellant's land was a public road until the land was alienated to her in 1992. The plan 'FM1' shows that the land is strategic in location as being the upper most lot with the access road leading to Gua Musang/Kuala Krai in the north and Forest Reserve Lebir in the south. In other words, the land is the gateway to Gua Musang/Kuala Krai and to Forest Reserve Lebir. Such being the case, I agree with the finding of the land administrator on the importance of the road to the public when he said:

> Saya menegaskan bahawa mereka perlu bergerak untuk masuk atau keluar ke tanah mereka. Tanpa jalan ini, pergerakan mereka akan terhalang.

The land administrator realized the mistake that the road should not be part of the land when it was granted to the appellant. He stated:

> Saya juga menyatakan bahawa jalan yang dipertikaikan ini sepatutnya dikeluarkan dan tidak diberi milik kepada plaintif tetapi oleh kerana kesilapan teknik, Pentadbir Tanah Kuala Krai telah tidak mengeluarkan jalan ini daripada pemberian milik hakmilik yang kemudiannya didaftar kepada plaintif.

I am also satisfied with his finding that there was no alternative route in this case. The so-called reserved road, and probably the same road referred to by Awang bin Da as 'jalan lencongan ke Lot 864', is not yet a road in the sense that it is practical and readily available for use by the public. It

is still a jungle, sloppy and hilly. It is therefore not reasonable, in my view, to treat the road reserve as an alternative route to the road. Unlike in *Liew Peck Lian* and *Si Rusa Inn*, there is no alternative route in this case.

The appellant defended her objection to the public right of way based on the principle of inviolateness of land. However, I am of the view that since s 390(3) of the Code allows for the creation of public right of way on private land, that principle must be considered in the light of the doctrine of *salus populi suprema lex* — the interests of the public are paramount, and that private interests may in some circumstances be subordinated to the higher interests of the public, when the State thinks it is proper to do so. In *S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors* [1982] 1 MLJ 204, a piece of land vested in the appellants was acquired under the Land Acquisition Act 1960 for a public purpose, that is for the purpose of building a hockey stadium. The appellants applied to the High Court for declarations to impugn the validity of the acquisition but the application was dismissed. Hashim Yeop A Sani J (as he then was) in the course of his judgment at p 207 applied the doctrine of *salus populi suprema lex* as a justification for the inroads and the rationale in cl (2) of art 13 of our Constitution:

> No law shall provide for the compulsory acquisition or use of property without adequate compensation.

On appeal, the Federal Court dismissed the appeal. Therefore, in my view, the doctrine is likewise applicable in this case.

In the absence of an alternative route, there is thus an urgent public necessity for the land administrator to grant a public right of way across the appellant's land, even though it is against the principle of inviolateness of land. The private interest of the appellant that she may lose good income from the use of her road must give way to the higher interest of the public. Without the road, the public cannot possibly 'move', and their livelihood will be seriously affected. The land administrator was therefore right in making the public right of way on the appellant's land, and in my view, he had exercised his discretion properly. He had not misdirected himself. Indeed, it would be grossly unjust and renders the provision of s 390(3) nugatory if the land administrator, in the face of the facts of this case, were to decide otherwise. He had complied with the provision strictly when he held the inquiries and investigations before he made the order. The parties, including the appellant, were heard and their views were duly considered. The appellant was compensated accordingly. GEM might be the applicant and stood to gain the most by the order, nevertheless, they are also a member of the public who are equally entitled to the benefit of the right of way as provided by law. Indeed, GEM should be commended for initiating the application.

Appeal dismissed.

Reported by Izzaty Izzuddin